Filed 4/15/03 In re Adrian R. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re ADRIAN R., a Person Coming Under the Juvenile Court Law.	B157971 (Los Angeles County Super. Ct. No. FJ28220)
THE PEOPLE, Plaintiff and Respondent, v. ADRIAN R., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Millie Escobedo, Referee. Reversed in part and affirmed in part.

Tara K. Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth N. Sokoler and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

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Adrian R. appeals from the order declaring him a ward of the court (Welf. & Inst. Code, § 602)[1] after a finding that he committed second degree robbery, two attempted second degree robberies and grand theft from the person. (Pen. Code, §§ 211, 664/211, 487, subd. (c).) The court ordered suitable placement and made a finding that the maximum theoretical period of confinement was six years eight months. He contends that: (1) the true finding must be set aside since the count 2 offense, grand theft from the person, is a lesser included offense of the robbery alleged in count 1; (2) the evidence is insufficient to support the finding of robbery in count 1; and (3) the court abused its discretion by ordering suitable placement.

We reject the contentions and affirm the order of wardship.

FACTS AND PROCEDURAL HISTORY

At approximately 9:30 a.m. on October 23, 2001, Samuel C. and a friend, Rodolfo A., were walking on the sidewalk at Vermont Avenue and 42nd Street in Los Angeles near Manual Arts High School. Appellant and two companions approached them. Appellant asked Samuel C. and Rodolfo A. for money. Samuel C. replied that he had nothing. Appellant told Samuel C. that if they had any money appellant would "beat the sh-- out of" them. Appellant punched Samuel C. in the eye and pushed him against a fence. Samuel C. ran and then looked back and saw one of appellant's companions punch Rodolfo A. in the neck. Rodolfo A. ran, escaping from appellant and his companions.

Samuel C.'s testimony was slightly different than that of Rodolfo A. Samuel C. claimed that appellant directed his request only to him, and he replied that he had $5. Appellant told Samuel C. that, if he had more money than the $5, appellant would beat him up.

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[1] Unless otherwise specified, all further statutory references are to the Welfare and Institutions Code.

Shortly thereafter, at approximately 10:50 a.m., 50-year-old Santiago Mendez was walking on the sidewalk on Exposition Boulevard near Jefferson Avenue in Los Angeles. Five young men, including appellant, approached him. A thin youth in a white T-shirt asked Mendez for money. Mendez replied that he did not have any money. The youths surrounded him and the youth who had asked him for money hit him on the head, knocking him to the ground. The youths closed in around him, punching and kicking him. The thin youth took his wallet. Mendez was questioned about whether appellant was involved in the robbery. Mendez replied that all of the youths actively beat and kicked him. He said that he was not mistaken about appellant's participation in the robbery.

After securing Mendez's wallet, the youths ran off in different directions. Mendez followed appellant and grabbed appellant by the shirt and the pants. Another one of the youths attempted to assist appellant by assaulting Mendez, but was unsuccessful in forcing Mendez to release his grip. The police arrived and took appellant into custody.

Samuel C. and Rodolfo A. saw the police detaining appellant. They told the officers that, earlier, appellant and two companions had attempted to rob them.[2]

In defense, appellant testified and claimed that, on the morning of October 23, 2001, he was with his friends, Jeremy and Steve, near Manual Arts High School. He denied that he and his companions had attempted to rob Samuel C. and Rodolfo A. He admitted that Jeremy hit Rodolfo A., but he claimed that he was not involved. Later, appellant asked why Jeremy hit the victims, and Jeremy replied that the victims had "jumped" him a few days earlier.

Appellant did not deny that Mendez was robbed. Again, he denied that he had participated in the robbery. He testified that he, Jeremy and Steve met two youths riding a bicycle that were friends of Jeremy's. There was a brief conversation, the youths shook hands with them and the two groups of youths parted. Simutaneously, Mendez walked

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[2] After the case-in-chief, appellant challenged the sufficiency of the evidence by making a motion to dismiss the petition pursuant to section 701.1.

by them on the sidewalk. The two youths on the bicycle robbed Mendez. Steve joined in the robbery. After the youths took Mendez's wallet, everyone ran. After running for a while, it occurred to appellant that he did not have to run because he was not involved in the robbery. He stopped running and Mendez grabbed him. One of the youths who had been on the bicycle tried to assist appellant's escape from Mendez's grasp, but desisted when he realized that appellant would not run away. At that point, the police car approached.

The court found true that appellant committed the robbery of Mendez and the attempted robberies of Samuel C. and Rodolfo A. The court said: "Mr. Mendez indicated that he knew that there were five persons there, [he] clearly identified this minor, and indicated that this was one of the minors that took part in the bearing. One of the questions that was asked of Mr. Mendez was whether he could truly see or identify any of the five. His response, extremely credible [*sic*], he was very nervous, indicated, well . . . if you had five persons beating on you, you know that the five persons are beating on you, but you're not going to stand looking at them. His face was down, but clearly he saw the five approach him and beat hi."

DISCUSSION

1. Multiple Convictions

The People concede and we agree, that the court erred by making a true finding that appellant committed both robbery and grand theft from the person.

The petition alleged, respectively, in counts 1 and 2, offenses of robbery and grand theft from the person. The People alleged in both counts that the victim was Mendez, and the evidence indicates that the allegations in counts 1 and 2 relate to the same act. The law on this point is settled. "Theft, in whatever form it happens to occur, is a necessarily included offense of robbery." (*People v. Ortega* (1998) 19 Cal.4th 686, 699.) In this case, the offense of grand theft was a necessarily included offense of the robbery, and the court should have made a true finding as to only the greater of the two offenses, the robbery. (*Id*. at p. 692.) Accordingly, we will reverse the court's order finding that

appellant committed grand theft from the person and modify the court's order setting a theoretical maximum period of confinement.

2. Sufficiency of the Evidence

We reject the contention that the evidence is insufficient to support the true finding in count 1 (the robbery of Mendez) on the grounds that there is no evidence that appellant participated with the other youths in the robbery.

It is the People's burden at the adjudication to prove every element of the crime beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 368.) "The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. The court must view the entire record in the light most favorable to the judgment (order) to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the minor guilty beyond a reasonable doubt. In making such a determination we must view the evidence in a light most favorable to respondent and presume in support of the judgment (order) the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 576, 578; *In re Roderick P*. (1972) 7 Cal.3d 801, 808-809.)" (*In re Oscar R*. (1984) 161 Cal.App.3d 770, 773; in accord *People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.)

The principles that apply to a review of the sufficiency of the evidence to support a criminal conviction also apply where a minor seeks review of the sufficiency of the evidence and wardship based on the violation of a criminal statute. (*In re Roderick P., supra*, 7 Cal.3d at p. 809.)

Appellant argues that Mendez could not specify how, or if, appellant was involved in the attack, and thus Mendez's testimony that all five of the youths participated in the robbery is insufficient to support the true finding of robbery. The claim amounts to nothing more than an invitation to this court to reweigh the evidence and substitute its judgment for that of the juvenile court. That is not the function of an appellate court. (*In re E.L.B*. (1985) 172 Cal.App.3d 780, 788; in accord, *People v. Ceja* (1993) 4

Cal.4th 1134, 1139.) We conclude that Mendez's testimony was ample to show that appellant participated in the robbery.

Whether a person has aided and abetted in the commission of a crime ordinarily is a question of fact. "Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense. [Citations.] In addition, flight is one of the factors which is relevant in determining consciousness of guilt. [Citation]." (*In re Lynette G*. (1976) 54 Cal.App.3d 1087, 1094-1095.)

Mendez testified that all five youths, including one on a bicycle, approached him. A thin youth in a white T-shirt demanded money. Mendez understood the youth's demand for money, but not the other comments the youths made to him because he did not speak English. Mendez refused to give the youth anything, and told the youth that he had no money. After his refusal, all five youths surrounded him, hit him on the head, knocked him to the ground, and repeatedly kicked him. The thin youth in the white T-shirt reached into Mendez's pocket and took Mendez's wallet. After the youth obtained the wallet, all five youths ran.

Mendez was questioned about whether he saw appellant punch or kick him. Mendez replied: "There were five of them. I cannot tell you that one of them did not do it because five of them were beating me up." Mendez also said that "all five [of the youths were] attacking [him] at the same time." He said that he could not tell which of the youths delivered any specific blow because he was knocked facedown and was beaten and kicked on the back. He acknowledged that initially appellant was one of the youths who stood further away from him. But he explained that when the youths attacked him, all five of them moved in close, surrounding him. He was certain that all five youths acted in agreement, and all five youths "attacked" him at once. During the beating, the five youths circled him and hit him from every angle, and each youth was standing within an arm's reach of him. There were only five youths in the area, and all five participated in the attack.

In *In re Lynette G*., *supra,* 54 Cal.App.3d 1087, 1095, the witnesses' testimony revealed that the minor approached the victim with the minors who committed the robbery and the minor was present when another minor committed the robbery. After the robbery, the minor ran off down the street with the same minors who committed the robbery. The court in *In re Lynette G.* said that minor's presence with the robbers before the robbery, her presence at the scene of the robbery and her flight with the robbers after the robbery constituted sufficient evidence to conclude that the minor participated as an aider and abettor in the robbery. (*Id.* at pp. 1092-1093, 1095.) The evidence in this case went well beyond the more minimal evidence found sufficient to support the true finding of robbery in *In re Lynette G*.

3. Order of Disposition

Appellant contends that at disposition the court abused its discretion by ordering suitable placement. We reject the contention.

Appellant does not dispute that the court made the necessary, express findings required by section 726 to support an order removing a minor from the custody of his parents. His claim is that the evidence does not support the court's exercise of discretion. He urges that appellant's six-month absence from school and his family's disruptive conduct in court was contradicted by other evidence or was irrelevant to considerations of removal from the home and these factors fail to support the order removing custody from the parents. He also complains that the court unreasonably ignored the probation officer's recommendation for home on probation.

The record shows that at disposition appellant was age 16. The robbery and attempted robbery found true at disposition were appellant's first violations of the law. He was suspended from high school in June 2001 for "ditching" classes, and he still was not reenrolled in school six months later at the instant disposition hearing. He had a learning disability and could not function in regular classes. His parents were attempting to find a program for him that would meet his special education needs, but they had not found one that satisfied them. The parents lived together and had a home and adequate income to care for appellant. They did not believe that appellant participated in the

robberies. They wanted appellant to live at home with them so they could work with him. Appellant's health was good.

The probation officer interviewed the parents and concluded that appellant was amenable to home supervision. The probation officer gave his opinion, that with the assistance of the probation officer, immediate educational arrangements could be made for appellant. However, the probation officer noted that, if appellant violated the court's orders while home on probation, residential care might be required.

The prosecutor urged suitable placement. He argued that there was evidence that appellant's home environment was not conducive to rehabilitation. The father and the brother ignored the court's orders to stay away from the witnesses during the adjudication. The father was particularly belligerent; in the court's hallway, the prosecutor personally had seen the father "mad-dogging" victim Mendez. Appellant's failure to attend school for six months demonstrated that appellant was out of the control of his parents. The gravity of the offenses, combined with the negative attitudes of his parents, required that he be removed from his home.

Appellant's counsel started to explain that the brother did not reside in appellant's home. Appellant's mother interrupted counsel and said that the brother was a "brother-in-law," i.e., the sister's boyfriend. The mother then proceeded to interrupt counsel again. When the court attempted to say something, the mother interrupted the court. The court had to admonish the mother not to interrupt the proceedings and not to argue with the court, instructions that she readily ignored.[3]

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[3] At the close of the adjudication, the mother interrupted the court while it was making its orders to conclude the hearing and insisted that the court release appellant to his parents. Appellant was detained and the mother inquired if the court was "going to keep" appellant. The court ignored her remarks, and the mother persisted by saying, "He's not going to run away." The court completed making its orders, and the mother asked, "Can I speak?" The court replied, "Listen. Mother, you need to bite your tongue right now." She replied, "No, because --" The court admonished the mother that she must stop interrupting the court. Nevertheless, the mother continued, arguing that the court should release the minor. The court admonished the mother to be silent. The court continued with the proceedings, ordering appellant's family to stay away from the

The court commented that the conduct of appellant's family at the adjudication, especially the sister's boyfriend, made it appear that the family set a poor example for appellant. The mother interrupted again and insisted that the boyfriend was not a member of her household. The mother blurted out that that the boyfriend had a restraining order outstanding to prevent him from contacting appellant's sister. She claimed that only appellant and her two grandchildren lived in the family residence. The boyfriend came over only occasionally.

The court told the mother that the conduct of the family in court seemed to belie the mother's claims and led the court to conclude that the mother could not exercise sufficient control over appellant's conduct. The court told the mother that the parents, especially the mother, also failed to accept the reality of appellant's situation -- appellant had committed three serious criminal offenses.

Appellant's counsel commented that he understood that appellant had been doing "home studies" and indicated that arrangements already were made to reenroll appellant in school. The mother said, "I have a document at home."

The court did not reply to the mother and said, "I understand." The court proceeded with its formal order of disposition. The court said: "[T]he minor's parents have failed to provide proper maintenance, training and education for this minor. The welfare of the minor requires that physical custody be removed from the minor's parents. [¶] Reasonable efforts have been made to prevent or eliminate the minor's removal from the minor's parents. Physical custody is taken from the parent and the minor is committed to the care, custody and control of the probation department for suitable placement."

The court spoke to the minor personally. The court told the appellant that if he did not behave himself in placement, the court would place him in a more restrictive

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victims in the case. The mother interrupted again and complained, "It's not fair, because he comes to court every time."

placement. The court also told appellant that if he behaved himself, the court would return him home.

Section 726 provides in pertinent part that "no ward or dependent child shall be taken from the physical custody of a parent or guardian unless upon the hearing the court finds one of the following facts: [¶] (a) That the parent or guardian is incapable of providing or has failed or neglected to provide proper maintenance, training, and education for the minor. [¶] (b) That the minor has been tried on probation in such custody and has failed to reform. [¶] (c) That the welfare of the minor requires that his custody be taken from the minor's parent or guardian."

California Rules of Court, rule 1493(c), requires that the court make one of the above findings at disposition if the minor is removed from the custody of a parent.[4]

"We review a commitment decision only for an abuse of discretion, and indulge all reasonable inferences to support the decision of the juvenile court. [Citations.]" (*In re Asean D*. (1993) 14 Cal.App.4th 467, 473; in accord *In re Teofilio A*. (1989) 210 Cal.App.3d 571, 578-579.) In determining whether there is substantial evidence to support the court's exercise of discretion, we examine the record in light of the purposes of the Juvenile Court Law and its increased emphasis on punishment as a tool of rehabilitation and a concern for the safety of the public. (*In re Asean D., supra,* at p. 473; *In re Michael D*. (1987) 188 Cal.App.3d 1392, 1395.) In making its order of disposition, the juvenile court must consider all the relevant and material evidence about the minor, including his or her age, the circumstances and gravity of the offense and the minor's previous delinquent history. (§ 725.5.)

The statutory scheme governing the disposition of juvenile offenders """"contemplates a progressively restrictive and punitive series of disposition orders . . . namely, home placement under supervision, foster home placement, placement in a local treatment facility and, as a last resort, Youth Authority placement.'" [Citations.]'" (*In re*

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[4] Appellant in his brief mistakenly refers to California Rules of Court, rule 1494(d), in lieu of California Rules of Court, rule 1494(c).

Teofilio A., *supra*, 210 Cal.App.3d at p. 577.) However, a juvenile court is not required to attempt less restrictive alternatives before ordering a specific commitment. (*In re Asean D., supra*, 14 Cal.App.4th at p. 473; *In re Teofilio A.*, *supra*, at pp. 575-578.) "[I]f there is evidence in the record to show a consideration of less restrictive placements was before the court, the fact the judge does not state on the record his consideration of those alternatives and reasons for rejecting them will not result in a reversal. [What is required is that] there must be some evidence to support the judge's implied determination that he sub silentio considered and rejected reasonable alternative dispositions." (*In re Teofilio A.,* at p. 577.)

The record discloses that the court did not abuse its discretion by ignoring the recommendation of the probation officer. A juvenile court is not required to accept at face value all the information presented to it at disposition. It is entitled to evaluate the credibility of the minor and his parents and to reject the recommendations of the probation officer if it finds that the probation officer's recommendations are unreasonable. (*People v. Warner* (1978) 20 Cal.3d 678, 683.) In this case, the court concluded that the probation officer's evaluation was superficial. The court discovered by observing the family dynamics during the adjudication that appellant's parents were incapable of providing the kind of discipline that the minor needed to make sure that he attended school and that he had a positive attitude toward authority. The record shows that the court was not arbitrary in rejecting the probation officer's recommendation. (See *In re Robert H.* (2002) 96 Cal.App.4th 1317, 1329.)

We reject appellant's claim that the evidence fails to support the finding that appellant should be removed from the custody of his parents. It is irrelevant that the court made all three statutory findings pursuant to section 726 and that there was no evidence to support the one finding that "the minor has been tried on probation . . . and failed to reform." Section 726 requires that only one of its three criteria be satisfied before the court properly can remove a minor from his home.

In this case, the evidence supports the other two express findings by the court that (1) "the parent . . . is incapable of providing or has failed or neglected to provide proper

. . . training, and education for the minor" and (2) "the welfare of the minor requires that his custody be taken from the minor's parent . . . ." (§ 726.) Appellant had a problem with reading and special educational needs. There was no evidence presented at disposition that he was being home-schooled. The mother's claim at disposition that she had a document at home does not show either home-schooling or that the mother was capable of home-schooling a child with appellant's special educational needs. Appellant had F's in all his classes before he was suspended. He was in dire need of remedial education to see that he learned to read and that he completed his high school education.

Further, the parents' inability to follow the court's rules and orders, and the disrespect that they showed to the court during the proceedings, tended to show that they had values and attitudes that prevented them from giving appellant the training and discipline that he needed to cope as an adult. The parents had difficulty conducting themselves appropriately in court. At the adjudication, the father and the sister's boyfriend were repeatedly disruptive and threatened witnesses despite court orders that they not engage in such conduct. The mother condoned the conduct or had no control over the other members of the family. The family misled the court as to their relationship to the sister's boyfriend so that he could attend the adjudication. The mother repeatedly interrupted the proceedings, argued with the court and interfered with counsel's ability to represent appellant. Despite the overwhelming evidence of guilt, the parents would not accept that appellant had committed the offenses.

The robbery and attempted robberies were dangerous, violent offenses, and it was appropriate to remove appellant from his home to impress him with the seriousness of the offenses. Suitable placement had the advantage of immediately providing appellant with the education he needed with no opportunity for him to avoid attending classes. In suitable placement, he would obtain the consistent discipline he needed.

The record shows that the court properly considered and rejected placing appellant at home on probation before making its order of suitable placement. (*In re Teofilio A.*, *supra*, 210 Cal.App.3d at p. 577.) The evidence supports the court's conclusions that the parents were incapable of providing, or neglected to provide, proper maintenance,

training and education for appellant, and appellant's welfare required that custody be taken from his parents. (*In re Asean D., supra*, 14 Cal.App.4th at p. 473; *In re Teofilio A., supra*, at pp. 575-578; *In re Michael D., supra*, 188 Cal.App.3d at p. 1395.)

DISPOSITION

The true finding as to count 2, the offense of grand theft from the person (Pen. Code, § 487, subd. (c)) is reversed. The order for a theoretical maximum period of confinement of seven years is modified to provide for a theoretical maximum period of confinement of six years four months, consisting of a five-year period for the robbery and two consecutive eight-month periods for the attempted robberies. In all other respects, the order under review is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

_____, P.J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
ASHMANN-GERST